Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-686

FRANCOIS CHIAPPE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No......

FRANCOIS CHIAPPE

Petitioner,

—v.—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCOIS CHIAPPE prays that a writ of certiorari issues to review a judgment of the United States Court of Appeals for the Second Circuit, entered on June 20, 1977, which affirmed a judgment of conviction entered by the District Court for the Eastern District of New York on March 4, 1977.

Opinions Below

Following the entry of a judgment of conviction in the District Court, the petitioner appealed to the Court of Appeals. On June 20, 1977, the Court of Appeals affirmed without opinion. The order affirming is reproduced as appendix "A" of this petition.

The opinion of the District Court denying petitioner's *Toscanino* motion is annexed as appendix "B."

Jurisdiction

On June 20, 1977, the Court of Appeals for the Second Circuit entered judgment against the petitioner.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Statutory Provisions Involved

Rule 403, Federal Rules of Evidence, which reads as follows:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 801 (d) (2) (C) and (D), Federal Rules of Evidence, which reads as follows:

> "Rule 801 — Definitions
> ***
> (d) A statement is not hearsary if —
> ***
> (2) Admission by party — opponent. — The statement is offered against a party and is . . . . .
> ***
> (C) A statement by a person authorized by him to make a statement concerning the subject or
> ***
> (D) A statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of their relationship."

Constitutional Provisions Involved

The questions raised in this petition involve the Due Process Clause of the Fifth Amendment and the Confrontation, Right to

Counsel and compulsory process provisions of the Sixth Amendment to the United States Constitution, which are as follows:

Fifth Amendment

"No person shall . . . . . be deprived of life, liberty, or property, which due process of law . . . . . ."

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right . . . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Questions Presented for Review

1. Whether the prosecutor deliberately misled the Grand Jury into returning an indictment which he knew was barred by the statute of limitations in violation of due process and the right to fair trial?

2. Whether appellant's presence at trial was secured by deliberately unnecessary and illegal actions of the government through its agents, thus voiding jurisdiction on due process grounds?

3. Whether the admission of post-conspiracy evidence insufficiently connected to the crime — and known by the prosecutor to be totally unrelated — unfairly prejudiced the jury and denied appellant a fair trial?

4. Whether the deliberate failure of the government to produce documents relative to the testimony of a crucial witness denied appellant a fair trial and violated his due process rights?

5. Whether the alleged failure of his trial attorney to secure grand jury minutes and move to dismiss the indictment based on the grand jury minutes, and his alleged failure to obtain certain documents from Agentina deprived appellant of effective assistance of counsel and a fair trial?

Statement of the Case

On February 15, 1968, appellant and eight other defendants were indicted for narcotics conspiracy violations.* Subsequently, extradition attempts to secure the appellant were set into motion. They proved to be fruitless, as they were denied by the Argentine Government on May 28, 1973.

Soon after the new military junta of General Navale came into power, the United States Government again proceeded to attempt to secure the appellant's presence in the United States for trial.

The eventually made arrangements included a trip to Buenos Aires by Assistant United States Attorney in charge of Narcotics Prosecution, Bernard Fried, accompanied by a State Department Legal Adviser, Mr. Louis Fields. The two met with U.S. Ambassador Robert G. Hill and DEA Agents located in Buenos Aires branch regarding the obtaining of appellant and others wanted for prosecution for narcotics violations.

The same group — absent Mr. Fried — then met with the Argentine Minister of the Interior to demand the fugitives. The group then reported back to Mr. Fried that the Argentine Minister had assured them that expulsions would be forthcoming, pending cabinet approval. Mr. Fried was further informed that the Minister would then appoint an official to deal directly with the Special DEA Agent In Charge, Mr. Tryal, to make all necessary arrangements for the securing of appellant, Chiappe, and the others into United States custody.

On May 21, 1976, Chiappe and his wife were driving along the street in their car, having just left their daughter at school. Suddenly, their car was surrounded by three cars out of which

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*All the defendants were accused of violations of 21 U.S.C. §§ 173, 174. The indictment incorporated a separate conspiracy as to some defendants involving violations of Sections 812, 841(a)(1), 841 (1)(A), 952(a), 960(a)(1) and 960(b)(1), which appellant was not part of and for which he was not tried.

came men dressed in civilian clothes.* These men then proceeded to brutalize Chiappe and his wife in order to gain custody of him. Specifically, he was beaten with gun buts, clubs, choked with a rope, and burned with lighted cigarettes until he, along with the seat of his car, were extracted. As a result of the kidnapping, he suffered severe lacerations, bruises, and the loss of most of his upper teeth, which were reduced to shards.

He was then bound hand and foot, blindfolded, injected with sedative drugs, and transported to a location some distance away by van and airplane. He was also soon thereafter straight-jacketed. The blindfold and straight-jacket were never removed at any time until well into the flight to the United States, some six days later.

Chiappe testified that during the next six days he was secured to what he believes was the foot of a bed, which he shared with three other individuals. He subsequently learned that two of the other prisoners were his co-defendant Miguel Russo, and one Yolanda Sarmiento. Chiappe did not know the identity of the fourth individual, but had heard from Russo and Sarmiento that this man had been shot to death in Argentina.** During these six days, Chiappe testified that he was deprived of any significant food, water, or toilet facilities, and was repeatedly physically abused while continually straight-jacketed and blindfolded.

Chiappe also testified that during some of these periods he heard English being spoken, but that he did not understand it or know the source of it. He also testified that either on the day of his departure to the U.S. or the day immediately before, his

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*The identities of these Argentine Federal Police are concededly known by the DEA and the U.S. Attorney. Mrs. Chiappe testified there were well-dressed strangers, who spoke English, present. Another civilian witness also testified to the presence of these men who seemed to be advising the man in charge. When the local police arrived, certain papers were flashed, and they left.

**This testimony by appellant was rejected by the Court, despite the fact that the Government did not call Russo or Sarmiento to rebut it. The failure to call Sarmiento was significant, since she was cooperating with the Government. She had, in fact, testified at other trials, and was given a five year sentence in consideration for her services.

blindfold slipped while he was being pushed during a transfer, and he saw a man whom he later recognized in the U.S. Attorney's Office to be DEA Agent Polumbo. He did not state that any beatings were taking place at that time.*

About the same time as Chiappe was being abducted from the streets of LaFalda, arrangements were being made in the United States for the Charter of a Braniff Airlines DC-8 and the sending of this plane, with almost 20 DEA agents aboard, to Buenos Aires to pick up its cargo of abducted fugitives.**

While the DC-8 and the agents it was bearing was at the Buenos Aires Airport, the three fugitives were spirited aboard by Argentine officials into the waiting hands of the DEA.

It is undisputed that Chiappe's blindfold and straight-jacket were not removed until about 15 or 20 minutes into the return flight to the United States. No need for such restraint was ever demonstrated or suggested; this was simply gratuitously done on "orders."

Upon his arrival in the United States on May 27, 1976, Chiappe was brought directly to the U.S. Attorney's Office for questioning, and from there to fact arraignment in the District Court. At the arraignment in the District Court, the judge — in the absence of counsel — advised the defendant of his rights, told him he should wait to see a lawyer before speaking to anyone, and then proceeded to question him about whether he had been mistreated by anyone.***

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*This was denied by DEA Agent Polumbo.

**Agent Polumbo testified these arrangements were made 10 or 11 days before arrival. Agent Corcoran said about one week before arrival.

***It is submitted that this questioning by the Court was improper, misleading, and designed to confuse a man who was non-English speaking, and had just suffered a week of sensory deprivation and brutality. The record attests to this conclusion. (Minutes of May 27, 1976).

It was only on June 4, 1976, when counsel was present, that the wounds sustained by Chiappe — by then about two weeks old — were first described in the record by the Court.

The bulk of the Government's case at trial came from the lips of Michel Nicoli, an unindicted co-conspirator. Suffice to say that his testimony at trial was severely impeached, and was significantly at variance with his prior testimony concerning the crucial final transaction which brought the case within the statute of limitations.

The government then called an Argentine Police Officer, Borsalino, to testify concerning an arrest he made of appellant in May of 1968, some three months after the conspiracy ended, under the government's theory. This policeman basically testified that on March 17, 1968 he arrested Chiappe and his wife as suspects in a bank robbery investigation, and that Mrs. Chiappe, at the time of arrest in the street, was in possession of $19,000.00 in U.S. currency. He also testified that Chiappe produced false identification papers and a false passport at the time of his arrest in the street. Borsalino capped his testimony by saying that Chiappe immediately consented to a search of his apartment, which search produced several photographs subsequently introduced into evidence.

Significantly, Chiappe testified at the hearing that the arrest took place on March 15, 1968, his birthday. He further swore that he was brutally tortured by means of electricity being applied to sensitive parts of his body such as his ears, breasts, anus, and testicles for a period of two days. Chiappe also stated that he had complained of this torture to the Argentine judge, and that the items in question were only found in a search of the room he and his wife occupied in his in-law's house *after* the torture. The Court rejected Chiappe's testimony as incredible.

Shortly after the trial — and almost up to the date of sentence — counsel received documents from Argentina taken from the Argentine bank robbery file. Such documents were specifically requested by the Court and counsel during Borsalino's testimony at trial, and were never produced by the U.S. Attorney, even though he was aware of their existence and had personally

examined them in Argentina in the presence of an Argentine judge, who also testified in person at the hearing.

These documents revealed the true nature of the 1968 arrest, including the dismissal of the bank robbery charges against appellant, and the return of the $19,000.00 to his wife as being *legitmately hers*. Most importantly, they demonstrated Chiappe's torture, and refuted significant points of Borsalino's testimony.

The motions for a new trial made on the basis of these documents were summarily denied by the Court without a hearing.

Reasons for Granting the Writ

Point I

By deliberately misleading the Grand Jury through the manipulation of the testimony of the only witness, the prosecutor fraudulently obtained an indictment against appellant which he knew was barred by the statute of limitations.

The presentation of the case to the Grand Jury took place on February 15, 1973, *one day* before the expiration of the statute of limitations.*

The only witness before the Grand Jury was co-conspirator Michel Nicoli, the Government's main witness at trial.

The witness was led in the most egregious manner through testimony concerning two separate conspiracies in which he was involved. Through its extensive interviews of Nicoli from December 1972 until the time of his testimony before the Grand Jury, the Government knew that Nicoli stated repeatedly that his conspiracy with appellant terminated in December of 1967. This is reflected in the 3500 materials made available to counsel at trial (T. 571). See Government's exhibits 3500-4 Paragraphs 52, 47; 3500-5 Page 9.

*On the same day the indictment was filed, the arrest warrant for appellant was issued, and the indictment was ordered sealed.

More specifically, concerning February 1968 — the crucial last consumated three (3) kilo trip testified to by Nicoli at trial, which brought the case within the statute of limitations — Nicoli testified as follows:

Q. During February of 1968 did you enter the United States at Miami, Florida in order to make preparations for this forty kilogram delivery?

A. Yes.

Q. At that time were your stopped by Customs and questioned?

A. Yes.

Q. Shortly thereafter, did you depart from Miami to New York?

A. Yes.

Q. Did you ultimately go back to South America without accomplishing anything?

A. Yes.

(Grand Jury Minutes of 2/15/68, P. 10)

This is in direct conflict with his trial testimony — highlighted by the trial judge during the instructions to the jury regarding the statute of limitations — that on February 14, 1968 he went to Miami to pick up 3 kilos for delivery to New York; that he was detained by customs in Miami; that he went to New York without picking up the heroin; that his buyer sent someone to Miami who picked up the drugs; that he sold it in New York, and departed for Buenos Aires on February 16, 1968 where he met Rossi and split the money.

Yet, knowing from over two months of exhaustive interviews of Nicoli that the conspiracy involving Nicoli and appellant ended in December of 1967, the prosecutor conveniently omitted asking Nicoli when he broke up with appellant, and proceeded to lead

him through testimony which indicated only one continuous conspiracy.

Interestingly enough, when counsel cross-examined the witness based on these same debriefing reports at trial, before a petit jury, the U.S. Attorney made the following objection (T. 588):

> MR. SCHLAM: These are matters which concern this witness' relationship with Rossi, after by his own testimony, he no longer was associated with Chiappe. And I think that this is highly confusing as far as the jury is concerned. It serves no purpose because it doesn't impeach anything that he said on direct examination.
>
> And I think the only purpose that I can see for this type of cross-examination is to obfuscate the case as far as the jury is concerned.

From the record of the Grand Jury proceedings, it is clear that the prosecutor at *that* time deliberately sought to "confuse" and "obfuscate the case as far as the jury is concerned."

Thus, the prosecutor deliberately misled the Grand Jury into voting the indictment against the defendant on which he was tried.* He never instructed the Grand Jury that an indictment against appellant would be barred by the statute of limitations. In addition, he deliberately led Nicoli through his examination before the Grand Jury and thus was able to prevent the witness from telling the Grand Jury that the conspiracy involving himself and appellant ended in December of 1967.

The prejudice to appellant is enormous. He was brought to trial on this fraudulently obtained indictment more than three (3) years later, by which time witness Nicoli had conformed his

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*Curiously, a second indictment 73 Cr. 239, was filed on March 5, 1968. This indictment was virtually indentical as concerns appellant. The only difference was the addition of certain overt acts as concerns the second, separate conspiracy in which Nicoli was involved. The second indictment was apparently handed down by a different Grand Jury, as appears from the signatures of the foremen. Only one set of minutes appeared in the 3500 materials.

testimony to the needs of the statute of limitations.

Because of the deliberate misconduct of the Assistant United States Attorney, appellant was again denied his basic due process right to a fair trial, *Chambers* v. *Mississippi*, 410 U.S. 284 (1972). This Court, through its supervisory powers over the District Courts, should not permit the government to benefit from so aggravated an instance of prosecutorial misconduct, and should dismiss the indictment with prejudice.

Point II

Because appellant's presence for trial was secured by deliberately unnecessary and illegal actions of the government through its agents, the jurisdiction of the District Court should be voided.

In 1974, the Second Circuit decided the landmark case of *United States* v. *Toscanino*, 500 F. 2d 267 (2d Cir. 1974). The sweeping language of *Toscanino* declared that the antiquated doctrines of *Ker* v. *Illinois*, 119 U.S. 436 (1886) and *Frisbie* v. *Collins*, 342 U.S. 519 (1952) were inconsistent with recent judicial censure of government illegality in law enforcement, resulting in the application of the exclusionary rule. The Court held these standards applicable to the government sponsored abductions of felony suspects.

Yet, in two cases which soon followed *Toscanino**, the Court made an unfortunate and unnecessary emasculation of the *Toscanino* holding which one commentator has characterized as the retreat which became a rout.** It was unfortunate in that the prediction made in the concurring opinion of Judge Oakes in

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**Lujan* v. *Gengler*, 510 F. 2d 62 (2d Cir. 1975), *United States* v. *Lira*, 515 F. 2d 68 (2d Cir. 1975).

***The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents. 50 N.Y.U. Law Review 681 (June 1975). Just how far we have come full circle is reflected in the fact that the same District Court which denied Toscanino's claim has denied appellant Chiappe's claim, citing the same authority: *Ker* and *Frisbie*.

Lira,* has now come true; defendants have continued to arrive in the United States after having been abused and abducted in foreign countries. The trend is notorious and highly publicized, as witnessed by the *Newsweek* article which appeared on August 16, 1976. A fair reading of this article, which describes several recent abductions — including a highly detailed (and illustrated) account of the kidnapping of appellant Francois Chiappe — reveals the cynical attitude of the law enforcement agencies (particularly the DEA), their casual, even disparaging attitude to the law and their expressed attitude that the ends justify the means. The writers of this widely read article leave the reader with the rhetorical question of whether such wholesale lawbreaking by the United States government is not, indeed, too high a price to pay for the actual results obtained, and asks who the real criminals in fact are.

This, then has been the seed spawned by the failure to live up to the promise of *Toscanino*. Moreover, it is one which continues to grow and flourish. The public attitude of discontent with the performance of the DEA is reflected in the lengthy investigations of this organization by a Committee of Congress,** a Committee of the Senate,*** and the recent indications and public statements of the newly appointed Attorney General, the Hon. Griffin Bell, to the effect that the DEA may well be eliminated.****

Yet, the problem is that much exacerbated by the fact that the DEA is unique among police organizations in that it is an arm of the prosecuting agency, the United States Attorney. The system of checks and balances which exist between local prosecuting

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*515 F. 2d 68 at 73

**House of Representatives, Committee on International Relations, Sub-committee on International and Military Affairs (April 29, 30, 1975; October 22, 1975; January 27, 1971; June 29, 1976).

***United States Senate, Committee on Government Operations Permanent Sub-Committee on Investigations, Interim Report on Federal Narcotics Enforcement Report No. 94-1039 (July 19, 1976).

****U.S. Senate Hearings on the Judiciary on Confirmation of Nomination, January 1977. Press Briefing, February 10, 1977, Wash., D.C. Q & A Session with Employees of Department of Justice, Wash., D.C., March 19, 1977. Press Conference, Wash., D.C., March 18, 1977.

agencies and police departments, and a relatively unbiased and detached look at the methods of making cases and gathering evidence is greatly reduced, if not entirely eliminated, when each arm is part of the same body. The recognition of the inherent danger that exists is not exposing wrong doings in one section which may rather be absorbed within the totality of the system, may well be one of the primary reasons for the desire by the Attorney General to eliminate the DEA.

The facts brought out at the hearing amply support the appellant's claim that his kidnapping from Argentina was produced, directed, and carried to its inevitable conclusion by agents of the United States Government. Thus, it is clear that the United States Government was unsuccessful in obtaining appellant by extradition since early 1973.* The United States Government then waited until the military junta of General Videla took power and on April 28, 1976 sent Assistant United States Attorney Bernard Fried, Chief of the Narcotics Section in the Eastern District and Louis Fields, a legal advisor to the State Department, to personally meet with the local DEA agents, the U.S. Ambassador, Mr. Robert Hill, who then met with the Argentine Minister of the Interior, and informed the Argentine Authorities as to who was wanted by the United States. Finally, Assistant United States Attorney Fried's memo concerning these meetings (Gov. Ex. 3 at hearing) clearly states: "Assuming that the authority [to expel] is given, then the minister will appoint an official *to deal directly* with S.A.I.C. Tryal to make all necessary arrangements." (emphasis added).

Subsequently, on May 21, 1977, appellant was brutally beaten and arrested by unidentified men in civilian clothes and illegally**

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*Appellant had been provisionally arrested by Argentine authorities in September 1972; he was released on May 28, 1973 when the Argentine Courts affirmed the refusal of the extradition for him requested by the U.S. Government.

**Appellant's local counsel had gone to an Argentine Court and secured a writ of habeas corpus. However, the ministry of the Interior claimed they knew nothing of his abduction, thus frustrating the action of the court.

held incommunicado with other prisoners until arrangements could be made for the DEA to arrive *en masse* in Argentina on May 26, 1976, in a chartered Braniff jet aircraft, in order to pick up their prisoners.* Additionally, the expulsion order eventually presented to the U.S. Attorney was illegal on its face.**

It is further undisputed that shortly after his initial abduction on May 21, 1976 in the streets of LaFalda, appellant was blindfolded and straight-jacketed. This is the condition in which the DEA agents received him, and this is *the condition in which he was kept by them* until at least 15 minutes into the flight to the United States. No necessity for this restraint was ever demonstrated, other than that these wer the "orders received from superiors." One wonders, indeed, why a straight-jacket, and, more particularly, a blindfold was necessary, unless there was something that everyone want to make sure that Chiappe did not see, in addition to keeping him disoriented.

Sensory deprivation is a recognized form of torture, and the mere fact that the DEA agents kept him in this condition from the time he was received, until well into the flight to the U.S. — absent anything else — makes them guilty of mistreatment and denial of procedural justice as defined in the Foreign Relations

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*It is clear that the prisoners were held incommunicado to await the arrival of the DEA, and for no other reason. Both agent Polumbo and agent Corcoran, testified at the hearing that arrangements for the trip and the charter of the jet aircraft were made "about a week" prior to their arrival in Argentina.

**The expulsion order contained an individual identification number which was not that of Chiappe. In fact, it was so totally different (7159174 as opposed to 92001957) that such disparity could not be attributed to error. Additionally, Chiappe was never afforded an appeal of the decree to the Courts, as provided by law. More incredibly, he was said to have "chosen" to be expelled to the United States, which has sought to extradite him for over three years.

Law of the United States.* This period of an hour or so before the take-off of the jet to the United States was but a *continuation* of the treatment Chiappe had been subjected to for the six previous days while awaiting the arrival of the aircraft and the DEA agents. This, indeed, is conduct which "shocks the conscience."**

It is further clear that the Argentine federal police, who actually abducted Chiappe, tortured him and held him incommunicado to await the arrival of the chartered jet. A warrant had been issued in February of 1973 for Chiappe's arrest. After the failure of the extradition proceedings, it became clear that the arrest could not be effected *directly* by the DEA. Hence, arrangements were made for the Argentines through the Ministry of the Interior, to actually make the arrest, and then hold Chiappe until arrangements could be made to transport him to the United States. These persons, whose identities were known to the Buenos Aires Office of the

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*American Law Institute, Restatement of Law Second, Foreign Relations Law of the United States, Secs. 178-182 (1965).
Chapter 2: INADEQUATE ADMINISTRATION OF LAW
Topic 1. Denial of Procedural Justice
§178. Denial of Procedural Justice defined as used in the Restatement of this subject, "denial of procedural justice" means conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice specified in §165 with respect to the procedure followed in enforcement of the state's law as it effects the alien in criminal, civil or administrative proceedings, including the determination of his rights against, or obligations to, other persons.
§179 Arrest and Detention
• • •
(3) Mistreatment of an alien in the course of arrest or during detention is denial of procedural justice.
(b) *Mistreatment:* Examples of mistreatment within the meaning of subsection (3) are: unnecessary injury during arrest, the compelling of unnecessary physical exertion harmful to health, detention in unsanitary conditions, and torture of any kind, whether physical or mental. Restrictive measures that have no purpose of presenting escape, protecting the safety or security of the arresting officials, or maintaining reasonable rules of prison discipline, but are in the nature of punishment for conduct occurring prior to arrest, are wrongful under international law, since punishment is warranted only after conviction.

**_Rochin_ v. _California_, 342 U.S. 165 (1952) cited in _Toscanino_, 500 F. 2d at 281.

DEA, were thus the agents of the DEA. How can this Court ignore the criminal conduct of the DEA under the standards applied daily to "civilian" defendants in the District Courts?* Neither of the last two arguments were dealt with by the District Court.

In defendant's motion papers dated January 7, 1977,** it was argued that in cases such as this, the burden of proof — once the defendant has met the burden of going forward — should be shifted to the Government to prove that jurisdiction was properly obtained. This is because by the very nature of the abduction and his physical abuse and sensory deprivation, the defendant is not able to prove how the abduction took place. That knowledge rests exclusively within the province of the abductors — in this case the Argentines and the DEA. Thus, the burden cannot be placed on appellant to prove facts which, of necessity, are not within his power to prove. The shifting of the burden of proof is not unreasonable in light of the fact that in other instances where the exclusionary rule may be put into operation, e.g. search and seizure, confession, the burden of proof does rest on the Government.

In an attempt to bring further evidence before the Court which came out only after the testimony offered by DEA agents and Assistant United States Attorney Bernard Fried, Appellant, in his motion and memorandum dated January 14, 1977*** requested the testimony of additional witnesses who were either directly involved in the events in question, or were privy to information necessary to establish appellant's claim that he was kidnapped and

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*Title 18 U.S.C. Section 2, which reads as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

**Item 40 record on appeal.

***Item 41 record on appeal.

physically abused by or at the direction of American agents.*

It is submitted that the denial of these motions by the District Court placed an unfair — if not impossible — burden on the appellant which amounts to a denial of due process of law. This argument comes within the spirit of such basic fairness cases as *Brady* v. *Maryland*, 373 U.S. 83 (1963). This information, of course, has nothing to do with the question of defendant's guilt or innocence. Rather, it goes to the more fundamental question of whether he should have been before the Court at all to face that determination.

A most distressing aspect of this case is that the Government — through the U.S. Attorney and its investigative arm, the DEA — has acted under the "color of law" after its failures within the law, and deliberately waited until the change in government occurred in Argentina. Once this military regime came into power, the DEA got what it wanted. But consider that in this case the U.S. Attorney and the DEA collaborated with a regime which has been officially labelled by our President and Congress as one which *consistently violates basic human rights*. One need only glance at some of the hundreds of instances reported in the media to appreciate the extent to which this designation is amply deserved. Yet this is the same regime with which the U.S. Attorney and the DEA collaborated in this enterprise, and from whose dirty work — at their request — they now seek to profit, and upon which they now seek the absolution and blessing of this Court. Clearly, the Court could not seek as a technicality the official protest of the government of Argentina under these

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*The information and witnesses sought were the following:

a) all DEA agents who went to Argentina in connection with the arrest of the defendant,

b) all DEA agents located in Buenos Aires branch.

c) all Argentine police officers or their agents who participated in the abduction of Mr. Chiappe and his subsequent detention and torture prior to his transfer to the DC-8 which took him to the United States of America,

d) United States Ambassador to Argentina, Robert C. Hill,

e) DEA head Peter Bensinger,

f) all State Department and DEA records dealing with the planning and actual abduction of Francois Chiappe.

present and then-existing circumstances.

Even if this Court should find that the appellant was not subjected to an unconstitutional seizure under *Toscanino* standards,* or conduct which falls under the *Rochin* standard, it is urged that basic fairness dictates that the Court exercise its supervisory authority over the District Court** by holding that although the government's actions may have fallen short of directly infringing a constitutional right of the appellant, they nevertheless debased the process of justice, and abused and degraded the District Court's criminal process.

The consideration of efficacy underlying the exclusionary rule support of divestiture of jurisdiction in cases such as the one at bar. The deterrence of official misconduct would be nobly served, if for no other reason than that abductions such as appellant's require careful planning and significant expense. More importantly, exclusion would discourage government conduct which forces the judiciary into the posture of knowing and approving accomplices to conduct which may violate fundamental protections of the Constitution, but most importantly, go against every notion of fundamental fairness. The short-term goal of increased police efficiency*** is too high a price to pay in lieu of requiring the Government to conform its police practices, both at home and abroad, at the very inception of a criminal prosecution.

The Second Circuit, in the recent past, has viewed only extreme physical abuse as deprivation of due process, yet an individual who faces long periods of imprisonment is "injured" far more

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*500 F. 2d at 275

**_McNabb_ v. _United States_, 318 U.S. 332 (1943) cited with approval in _Toscanino_, 500 F. 2d at 276.

***A dubious conclusion when one considers the projected move at abolition of the DEA by Attorney General Bell, instigated — to a great extent — by the *lack* of efficiency of the DEA and its poor performance record. (See State Hearing Summary, July 19, 1976, pages .) Federal Narcotics Enforcement, Interim Report of the Committee on Government Operations, United States Senate, made by it Permanent Sub-committee on Investigations, July 19, 1976, pp. 41-44.

than one who is physically abused. If this argument were to be consistently applied, Courts would admit fruits of an illegal search and seizure where the "injury" would be no greater than that which a defendant would endure through a lawful search. This argument, of course, has been explicitly rejected.*

Basic fairness dictates that this Court should not tolerate the conduct of the Government in this case (and many others) and should divest the District Court of its jurisdiction.

Point III

By the admission of post conspiracy evidence insufficiently connected to the crime — and known by the prosecutor to be totally unrelated — the jury was unfairly prejudiced, and appellant was denied a fair trial.

By the Government's own theory of the case, the conspiracy involving appellant terminated as of February 16, 1968. Yet the Court permitted to be introduced evidence through an Argentine Police Officer, that was devastating in its unduly prejudiced effect on the jury.

Officer Borsalino testified that on the 17th of May, 1968 he arrested appellant and his wife in the street, and that appellant produced a false passport and identification papers, and that a search of his wife's purse produced $19,000.00 in U.S. currency. When questioned by the Argentine police regarding the $19,000.00, Mrs. Chiappe allegedly said that her husband, the appellant, had given it to her before they left their house. Immediately after the arrest, the appellant "consented" to the search of the room he and his wife were using in his father-in-law's home, and photographs showing him together with other co-conspirators were seized. These were also admitted into evidence. Despite lengthy discussions on the subject, the Court did not give any limiting instructions to the jury.

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*_Silverthorne Lumber Co._ v. _United States_, 251 U.S. 385 (1920).

It is appellant's contention that the admission of this evidence was an abuse of the Court's discretion under Rule 403, Federal Rules of Evidence. *United States* v. *Robinson* 544 F. 2d 611 (2d Cir. 1976).

The probative value of the evidence was minimal, and depended on the jury drawing two quite weak inferences: that the money was in fact proceeds of narcotics transactions which were part of the conspiracy charged. There is no basis in the evidence from which to draw such inferences. There was no evidence even tending to show that appellant was involved in narcotics activities after February 16, 1968, and there was no evidence that the passport in the name of Bianchi, had at any time been used by anyone in connection with narcotics activities.*

Furthermore, the money was admitted into evidence only on the basis of the admissibility of a statement by appellant's wife that he had given it to her prior to them leaving home. The Court rules that pursuant to Rule 801(d)(2)(6)(01), Federal Rules of Evidence, appellant's wife was acting as his agent. The Court based its finding of agency solely on the fact that appellant and the relator were husband and wife, and were walking hand-in-hand at the time of the arrest.

It is axiomatic that agency cannot be proved solely by declarations of the alleged agent, but more must be established by independent proof. The independent proof may be circumstantial, but is must be "substantial."** The mere fact of a husband-wife relationship is insufficient*** to show an agency. There was *no proof whatsoever*, that Mrs. Chiappe was involved in or even knew of any of the alleged drug activities of the appellant.

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*The inferences to be drawn as to passports are equally dependent on an inference on an inference.

**U.S. v. *Consolidated Laundries Corp.*, 291 F. 2d 563, at 476 (2d Cir. 1961).

***4 Wigmore, Evidence §1078 at 126 (3d ed. 1940).

While it is true that the Second Circuit has held that large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is admissible to show the doing of an act requiring those means,* such is not the case here. Firstly, there was no evidence whatsoever of any further narcotics activity by appellant after February 16, 1968, so that a pattern of conduct could not be shown.** Nor were the items contraband which were clearly indicative of narcotics activity.***

Secondly, and most importantly, the Government knew that the 1968 arrest was on suspicion of bank robbery charges — not narcotics — and that after an investigation of one year, the bank robbery case was dropped against appellant, and the $19,000.00 returned to Mrs. Chiappe after a Federal Examining Judge in Argentina found, to his satisfaction, that Mrs. Chiappe was legitimately in possession of the $19,000.00. Moreover, the error is compounded now since there is evidence, not made available to the prosecutor at the trial, that the Police Officer had been lying, and that the search may have been the result of torture. (see Point IV).

The testimony at the trial rested primarily, if not almost solely, on the testimony of Michel Nicoli, an alleged co-conspirator whose credibility was severely put in question.**** Thus, the case against appellant was far from "air tight." In fact, the jury deliberated for a period of two full days and at one point — after

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*See *United States* v. *Tramunti*, 531 F 2d 1087 (2d Cir. 1975), ($900,000.00 in cash); *United States* v. *Magnano*, 543 F. 2d 431 (2d Cir. 1976) $500,000.00 connected by testimony.

**See *United States* v. *Papadakis*, 510 F. 2d 287 (2d Cir. 1975), later similar act.

***See *United States* v. *Bermudez*, 526 F. 2d 89 (2d Cir. 1975), implements, scales, lactose with traces of narcotics on them.

****Among other things, Nicoli admitted that he had received a sentence of three years jail and six years special probation under a plea to cover three indictments; that he was responsible for importing 800 Kilos of heroin into the United States; that the government would not send him to France, where he was under sentence of death; that the had been paid $600-700 a month for several years for his services.

convicting co-defendant Russo — indicated they could not reach a verdict as to appellant. It was only at about 9:00 p.m. on the second night that the verdict was returned. This is the main factor which distinguishes it from cases already cited, and the doctrine of *United States* v. *Ravich*, 421 F. 2d 1196 (2d Cir. 1970).

On the other hand, the unfair prejudice suffered by appellant was great. All the evidence did was to bring irrelevant material before the jury which led to inferences which were not provable in this case, namely evidence of bad character, which was not placed in issue by the appellant.

As *Wigmore* has noted:*

> The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with a jury, in or out of court.

This particular difficulty which arises where the proferred evidence connects a party with a highly charged public issue, such as organized crime, or, as in this case, international drug trafficking.

The Court compounded the error by specifically instructing the jury that this post conspiracy evidence was admissible against appellant (T. 941), instructing them as to the effect of Mrs. Chiappe's statement (T. 957), and specifically permitting the jury to infer from the evidence that appellant was engaged in subsequent narcotics activities after the termination of the conspiracy (T. 964), and that appellant was arrested for narcotics activities, and that both he and his wife were searched for proceeds of narcotics.**

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*1 Wigmore, Evidence § 57 at 436 (2d. Ed. 1940).

**The Court stated to counsel that it was a strange defense to a narcotics crime that the defendant is not a narcotics dealer but a bank robber. However, this is the crux of the argument. The Court, knowing what the true facts were, put counsel in the horns of this exact dilemma by its ruling (T.991). This in light of the fact that no character evidence would be offered (T.992).

The prosecutor, of course, made ample use of this evidence in the closing portion of his summation, arguing that this evidence was the proceeds of the final narcotics transaction and that this was corroboration of the truth of Nicoli's testimony (T. 1044, 1057, 1106-1108).

The admission of this evidence unduly prejudiced the jury in a very close case affecting the judgment and denied appellant a fair trial.

Point IV

Because the government deliberately failed to produce documents relative to the testimony of a crucial witness, appellant was denied a fair trial.

By a motion dated January 20, 1977 and supplemented on February 28, 1977, appellant moved the trial court for a new trial based on documents just received from Argentina which were known to the prosecutor before the trial, and which were never produced by him for the defense. On March 4, 1977 the District Court denied the motion without a hearing.

A. The Newly Received Evidence

Documents have now been received from Argentina which demonstrate that a key prosecution witness at the trial, Police Officer Jesus Borsalino of the Buenos Aires Argentina Police Department, testified falsely before both the Court at a hearing and before the jury at the trial in chief.

These documents, which are certified copies of the official records of the Court, and most of which are reports issued by the Examining Federal Judge, Miguel Inchausti, demonstrate the following:

a) The date of the arrest of Francois Chiappe was May 15, 1968.

b) One Lucien Sarti, a co-defendant, was also arrested on May 15, 1968 in the same house where Chiappe was ar-

rested when Chiappe's birthday was being celebrated.

c) That Francois Chiappe was in fact subject to torture during the days of May 15 and May 16, 1968, and that he still bore the physical evidence of this torture on May 27, 1968.

d) That Francois Chiappe did in fact complain to the Argentine Court of having been tortured.

e) That Francois Chiappe was held incommunicado for 10 days pursuant to his arrest on May 15, 1968.

f) That the robbery case against Mr. Chiappe was provisionally dismissed on February 26, 1969 when he was released from prison.

g) That the moneys seized from Mr. Chiappe and his wife at the time of arrest, along with a plaid hat and a pair of shoes, were returned to Mrs. Chiappe.

h) That the $19,000.00 in U.S. currency was returned to Mrs. Chiappe because she proved to the Federal Judge that she had been legitimately in possession of it.

All of the above facts were either not mentioned by the witness Borsalino, or were affirmatively denied by him during his testimony. Furthermore, cross-examination on some of these points was precluded by the Court since counsel could not demonstrate a good-faith basis for the asking of these questions. The jury was further instructed to draw no inferences from the asking of the questions.

B. The Documents Were Known to the Prosecutor and Were Suppressed.

During the course of the hearing held during the trial, it was brought out by Judge Nikleson that the file in question was examined by Mr. Schlam, the Assistant United States Attorney who prosecuted the case, together with Judge Nikleson in Buenos

Aires, Argentina (766-69).* Assistant U.S. Attorney Peter Schlam also stated on the record that he personally examined the robbery case file in Argentina (740-41). In fact, several exhibits removed from the file were introduced into evidence during this trial through the testimony of Police Officer Borsalino, specifically a false passport and identification card, several photographs, and a photograph of the $19,000.00 in U.S. currency allegedly seized from Mrs. Chiappe at the time of the arrest.

Clearly, the prosecutor was aware of the contents of the robbery case file, having examined it in the presence of an Argentine Federal Judge, and having selectively removed several items from it for presentation into evidence at the trial. Additionally, during the preparation of the witnesses for testimony, such material should have been reviewed by the witness and the Assistant United States Attorney.

It is equally clear that there was a specific request for the materials in the Argentine robbery file. This request was made not only by Mr. Chiappe's trial counsel (840, 982, 983), but also by the presiding judge himself (835, 840). No records were ever produced by the Assistant U.S. Attorney, and the cross-examination of Police Officer Borsalino and Judge Nikleson resumed without them, both at the hearing and at the trial in chief.

Significantly, the defendant Francois Chiappe testified at the hearing (T. 812-851) that the arrest took place on May 15, 1968, his birthday, that he was tortured for two days by means of electricity at which time Borsalino was present, that he had complained of the torture to the Argentine Court, and that he did not consent to any search.

Because the Court did not credit any of the testimony of the defendant Chiappe, and did credit the testimony of Police Officer Borsalino, the evidence was admitted into evidence, and Borsalino was permitted to testify before the jury.*

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*Significantly, Borsalino testified that he held Chiappe for the authorized detention period before bringing him before a judge (T. 692). Judge Nikleson testified that this authorized detention period is *48 hours* (t. 758).

In cases where suppression of evidence has been deliberate or where there was a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention, the Courts have uniformly held that a new trial should be granted since almost by definition the evidence is material. *United States* v. *Keogh*, 391 F. 2d 138 (2d Cir. 1968). It is further settled that the suppression of evidence by the prosecution favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution. *Brady* v. *Maryland*, 373 U.S. 83 (1963).*

The request in this case was very specific, and was made not only by trial counsel, but by the Court itself. The prosecution knew of the defendant's request. Since it failed to honor this even in good faith, it has only itself to blame.

It is further submitted that in this case the prosecution remained silent and allowed Police Officer Borsalino to give deliberately false testimony before the Court and the jury, and failed to correct it. Having examined the file in Argentina in the presence of a Federal Judge, the fact of the torture of Chiappe and the date of the arrest, as well as the return of the $19,000.00 and the reasons for it, could not have escaped the attention of the prosecutor. What happened in this trial is tantamount to the practices condemned by courts as incompatible with the rudimentary demands of justice. *Giglio* v. *U.S.* 405 U.S. 150 (1972). See also *U.S.* v. *Napue*, 360 U.S. 264 (1959); and *U.S.* v. *Seijo*, 514 F. 2d 1357 (2d Cir. 1975).

Borsalino's deliberate, false denials of facts which the prosecutor knew — or should have known — were false and which he did not take steps to correct, effectively foreclosed defense counsel's inquiry into these sensitive areas.**

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*The third category of cases outlined by the *Keogh* Court, where suppression was not deliberate, and there was no request, does not apply to the facts of the case.

**Borsalino specifically denied the Chiappe had been tortured *by anyone* (T. 733).

Not only were the deliberate falsehoods of P.O. Borsalino not corrected by the prosecutor, resulting in his repetition of the same before the jury, but by failing to produce the file as requested by defense counsel and the Court, counsel and the Court were precluded from impeaching the witness and bringing out his false testimony. It is submitted that for this reason alone, defendant is entitled to a new trial. The verdict was not saved because other competent evidence would support it. *Columbo* v. *Conn.* 367 U.S. 56 (1961) citied with approval in *U.S.* v. *Agurs*, 96 S.Ct. 2392 (1976).

C. The Evidence Suppressed Was Material

Under the *Brady* holding, a finding of materiality of the evidence is required. The Courts have uniformly held that when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence relating to credibility rather than substance falls within the rule. A new trial is required if "the false testimony count . . . in any reasonable liklihood have affected the judgment of the jury . . ." *Napue*, supra, at 271. As the *Napue* Court stated at page 269:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

See also *U.S.* v. *Gerard*, 491 F. 2d 1300 (9th Cir. 1974), *U.S.* v. *Puco*, 338 F. Supp. 1252 (S.D.N.Y. 174) aff'd. 461 F. 2d 846, aff'd. 493 F. 2d 1399 (2d Cir. 1974), *Corpus* v. *Beto*, 469 F. 2d 953 (5th Cir. 1973). *U.S.* v. *Badalmante and Yagid*, 507 F. 2d 12 (2d Cir. 1974). See also ABA Standards for Discovery and Procedure Before Trial §2.1 (1970); ABA Standard Relating to the Prosecution and Defense Function §3.11 (1971).

The significance of the documents just received from the Argentine file is evident on their face. Their importance as tools for impeachment is obvious, and their importance to the defense could not have escaped the prosecution.

It is interesting to note, that in his responding affidavit, the United States Attorney does not present documents to *disprove* those submitted by appellant. Rather, he chooses to argue their interpretation, dates, etc. The fact of the matter is that the declarations they contain as to the torture and the dates thereof, were made before the Federal Examining Judge in Argentina who was in charge of the case (Hon. Miguel Inchausti). If they had been false, such would immediately have been determined. Moreover, the examination of appellant — which supported his charge of torture — was *ordered* by this same judge. To this day the government has not seen fit to produce the file for examination.

Without the testimony of Police Officer Borsalino, it is highly doubtful whether Chiappe would have been convicted at all. The testimony of the informant and co-conspirator, Michel Nicoli, was highly suspect and subject to serious attacks on cross-examination. Hence, it became imperative to bolster his testimony with an unimpeachable source, which the government presented in the form of Police Officer Borsalino. Through his testimony some of the most devastating items of evidence were put before the jury, such as false I.D. card, a false passport, photographs, and the $19,000.00 in U.S. currency which the prosecutor was permitted to argue to the jury as having been the proceeds of the last narcotics transaction testified to by Nicoli, with the specific sanction of the Court (T. 964, 967, 973, 1076-77).

Had it been possible to attack the credibility of Borsalino and demonstrate his deliberate false testimony — which was impossible without these documents — the jury would have disregarded his testimony in it entirety. The showing of the lack of credibility of a Police Officer, of course, would cause Nicoli's testimony to be that much more suspect. See *United States* v. *Fried*, 486 F. 2d 201 (2d Cir. 1974).

More importantly, had the materials been available for examination and impeachment purposes, the evidence may never have gotten to the jury at all. The District Court's decision to admit the evidence was based on the fact that it credited the officer and discredited the defendant. Had the material been available, the tables would have been turned and the evidence held inadmissible as the product of torture.

The U.S. Attorney's argument that appellant at no time denied his link to the evidence seized through Officer Borsalino is indeed specious. The question of admissibility of illegally searched evidence has never depended on its probative value. Secondly, the fact that an examining magistrate (Federal Judge) of Argentina had determined that Mrs. Chiappe was entitled to a return of the money means that it was *not contraband*, either for purposes of a bank robbery *or* drug trafficking. It was grossly unfair to permit the prosecutor to argue an inference to the jury that the $19,000.00 were narcotics proceeds, knowing full well that the money had been returned to Mrs. Chiappe as being *legitimately* hers.

This case does not involve the issue of whether *additional* evidence tending to *further* impeach the credibility of a witness whose character and credibility have already been shown to be questionable was withheld. See *U.S.* v. *Rosner*, 516 F. 2d 269 (2d Cir. 1975). The Courts have held, however, that despite the presence of other impeaching material available to a jury, where further material affecting a witnesses credibility may have created sufficient doubt in a juror's mind, nondisclosure deprived the defendant of a fair trial. *U.S.* v. *Seijo*, 514 F. 2d 1357 (wd Cir. 1975); *U.S.* v. *Kaplan*, 470 F. 2d 100 (7th Cir. 1972). Here there was *no* basis for impeachment whatsoever at the time the witness testified since the file was not made available. Additionally, the jury was specifically instructed by the Court on numerous occasions that the mere asking of a question was not evidence of anything, and that no adverse inference may be drawn from the asking of a question and its denial by the witness. Moreover, trial counsel was precluded from inquiring into these areas because he had not established any good faith basis for asking the questions.

The end result was that a distinguished looking gentleman in a crisp uniform, who had 25 years of experience and was now a commanding officer was permitted to give totally unimpeachable testimony, and was permitted to deny facts which have now been proven false. Yet, because the date of the arrest was not the 17th but rather the 15th of May, 1968, and because of the demonstrable torture of Chiappe, the jury was not permitted to consider his deliberate lies and the strong motive he had to lie, having been one of the persons involved in the torture of Chiappe

on May 15 and 16, 1968. Not only did the suppressed evidence demonstrate the deliberate falsehoods and motive to lie, but it would have rendered the uncorroborated substance of his remaining testimony suspect, such as the consent to search, the alleged statements of Mrs. Chiappe, and the finding of the I.D., passport, photograph, and the $19,000.00. The jury simply did not have all the facts before them and were effectively misled in evaluating his testimony.

In fact, the trial judge — addressing himself to questions by counsel to Borsalino regarding possible torture of appellant — said he was not interested in counsel's "nonsense," (T. 695), specifically warned counsel "not to dare" to ask questions regarding torture on the pain of being held in contempt (T. 696), and walked off the bench during counsel's offer of proof, say he "won't waste time." (T. 698).

Now, with the acquisition of *some* of the documents from Argentina, it becomes obvious that this line of questioning was neither "nonsense," nor a "waste of time." Indeed, the prejudice appellant suffered as a result of the frustration of this line of questioning and the documents supporting it, is incalculable.

D. The Defendant Was Prejudiced

The prosecutor was duty bound to produce the file *before* the trial. Certainly, he was obligated to produce it when it was specifically requested. The purpose of this duty is not simply to correct an imbalance of advantage, where the prosecution may surprise the defense at trial with new evidence, as it happened in this case. Rather, it is also to make a trial a search for the truth informed by all relevant material, much of which, because of the imbalance in investigative resources, will be exclusively in the hands of the government. See *U.S.* v. *Bryant*, 439 F. 2d 642 (D.C. Cir. 1971). Such disclosure must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case. *U.S.* v. *Pollack*, 534 F. 2d 964 (D.C. Cir. 1976).

The facts of this case further exacerbate the lack of timely

disclosure. Here we are dealing with the contents of a file located in an Argentine Court thousands of miles away. Present counsel for Mr. Chiappe has had to depend on others 5,000 miles away, unfamiliar with the case, to look through this file and search for specific materials to answer my specific questions. Counsel can scarcely wonder what other materials may be contained in this file of over 300 pages of potential value, which could have been skillfully developed at trial.

It is curious indeed, that the prosecutor in this case went through the enormous expense of, among other things, bringing an Argentine Judge and Police Officer to testify at the trial, but chose not bring along a file whose production is mandated not only by due process, but by the direction of Rule 16 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3500.

Because of the deliberate suppression of the evidence, and the failure to produce it when specifically requested by trial counsel and the Court, the defendant was denied a fair trial. Without the materials since received, effective cross-examination — indeed, *any* cross-examination — of Police Officer Borsalino was effectively precluded.

In case of nondisclosure of *Brady* material, especially where it may have been occasioned by prosecutorial misconduct, Appellate Courts have often taken a prophylactic approach such as the comments of Judge Friendly in his concurrence and dissent in *U.S.* v. *Morell*, 524 F. 2d 550 (2d Cir. 1975); see also *Woodcock* v. *Amaral*, 511 F. 2d 985 (1st Cir. 1974).

Francois Chiappe complains that his trial did not have the *fundamental fairness* he was entitled to under due process of law. Here, the basic unfairness was occasioned by the prosecutor's failure to produce the court file from Argentina, even after it was specifically requested, and his taking a hear-no-evil, see-no-evil, speak-no-evil attitude toward a major witness in the case, who testified falsely.

To label this suppression intentional or negligent is unnecessary. It is enough that the prosecution was the active and effective cause of the nondisclosure of the evidence. Moreover, the request was,

after all, for discovery which was basic and not extraordinary. Yet, in all probability, had the evidence been available, Mr. Chiappe would not be in the position he finds himself today.

Point V

Did the alleged failure of counsel to properly prepare for the trial deprive appellant of effective assistance of counsel?

In affirming the conviction after oral argument, the Second Circuit Court of Appeals, speaking through Judge Mulligan stated in substance, that the failure of defendant's trial counsel to examine the grand jury minutes and move to dismiss was dispositive of the issue raised in Point I.

The Court also stated that trial counsel was responsible for failing to obtain materials in the Argentine Court files during his visit to Argentina.

The writ should be granted to determine whether alleged errors of his trial counsel which may have substantially prejudiced appellant's case, and resulted in his conviction, should be charged to the appellant, this making him suffer for the alleged malfeasance of counsel, thus depriving him of effective assistance of counsel. See *McQueen* v. *Swenson* (8th Cir. 8/23/77) 21 Cr. L. 2528.

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JURIS G. CEDERBAUMS

Exhibit "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

— against —

FRANCOIS CHIAPPE,

Defendant.

73 CR 164

Memorandum of Decision and Order

February 1, 1977

APPEARANCES:

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MISHLER, CH. J.

Defendant moves to set aside the jury verdict of guilty on a narcotics conspiracy charge (21 U.S.C. §§173 and 174), claiming the court lacked personal jurisdiction because of the alleged participation of United States officials and agents in his forcible abduction from Argentina. *See United States* v. *Toscanino*, 500 F. 2d 267 (2d Cir. 1974).* The court held a post-trial hearing.** The court also considered Mrs. Chiappe's deposition concerning the presence of English-speaking bystanders at the time of the defendant's arrest on May 21, 1976, as well as the depositions of Ms. Ester Szulman, Mr. Benito Eleodoro Quiroqa, and Mr. Lopez Tressa offered by defendant. The court finds as follows:

On March 31, 1976, Bernard Fried, Assistant United States Attorney for the Eastern District of New York and Chief of the Narcotics Section, conferred with Special Agent Gregory Phillips of the Drug Enforcement Administration ("DEA"), and representatives of the Immigration and Naturalization Service and the Department of Justice, in Washington D.C. Discussion centered around the treatment to be accorded fugitive defendants expelled by the Argentinian Government. In light of *Toscanino*, Mr. Fried advised them not to participate in any explusion. On April 27, 1976, Mr. Fried arrived in Buenos Aires with a legal adviser to the Department of State. The following morning they met with Rayhn Tryan, special agent of the DEA in charge of the Buenos Aires office, and Mr. Phillips, to instruct the Argentinians on the need to avoid mistreatment of any suspects because of the possibility that subsequent prosecution might be invalidated under *Toscanino*. The next day, Fried met with Ambassador Robert Hill, and asked him to convey to the Argentinian Minister of the

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*The motion made here, as in *Toscanino*, is described as a motion to dismiss. This is a misnomer since no challenge is made to the manner in which the indictment was returned, and the acts charged allegedly occurred after the return of the indictment. Defendant disputes the right to try him because of the alleged procedure employed by the United States in bringing him within the jurisdiction of this court.

**The trial was a joint trial with Miguel Russo. Russo waived the claim made here though he was in custody with Chiappe under the same conditions and brought to this jurisdiction on the same air flight. The court decided that the most efficient way to conduct the hearing on this motion was post-trial.

Interior, his concern about the treatment of citizens or residents of Argentina who might be turned over to the United States Government for prosecution on narcotics charges.

Sometime prior to May 21, 1976, the United States Government advised the Argentinian Government of the charges pending against both Chiappe and Russo and of its willingness to prosecute them. On May 21, 1976, at about 3:00 P.M., Chiappe was driving his car in the company of his wife in LaFalda, Argentina. Ten to twelve Argentinian police officers riding in three vehicles brought his vehicle to a stop. They exited their vehicles and forcibly removed Chiappe from his car without identifying themselves. Chiappe, believing that he was being kidnapped by guerrillas, resisted arrest. The police assaulted him knocking his teeth out and causing other injuries about the head and body. The police then handcuffed him or otherwise tied his hands behind his back, tied his feed, blindfolded him, and forced him into a vehicle. He was driven to one location and then flown to another. A strait jacket replaced the binding on his wrists; the blindfold remained. Chiappe recognized the presence of one Miguel Russo and on Yolanda (Samiento). He was kept in the strait jacket and blindfold for five days in the same room with the both of them.*

On May 26, 1976, Chiappe, Russo and Samiento were driven under Argentinian guard to Buenos Aires Airport. In the meantime, DEA agents flew to Argentina to take custody of the three. They arrived on a Braniff Airlines flight chartered by the United States on May 26, 1976 at about 9:30 P.M. The Argentinian police accompanied the three prisoners aboard the plane, placed them in the custody of the United States agents, and then left the aircraft. The plane was in flight soon after midnight of May 27, 1976. Approximately fifteen minutes out of Buenos Aires Airport, Special Agent Corcoran, assigned to guard Chiappe, removed the strait jacket and blindfold. The airplane arrived at John F. Kennedy International Airport on the morning

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*Chiappe testified that he was beaten repeatedly during this period. The court rejects his testimony of physical abuse (other than the restraints and blindfold) as unworthy of belief.

of May 27, 1976. No claim is made of mistreatment by United States agents after defendant came into United States custody.

The court rejects the testimony of Chiappe and his wife concerning the presence of English-speaking people at the time of his arrest and during his incarceration in Argentina believing it to be a fabrication crudely designed to fit the *Toscanino* standards for defeating personal jurisdiction otherwise obtained over non-resident aliens.

The court finds that the United States advised the Argentinian Government of the pending narcotic charges against Chiappe and others, and its intention of prosecuting the charges if it obtained jurisdiction over them. It urged the Argentinian Government to avoid any acts which might place United States jurisdiction over defendants in doubt. No United States official or agent participated in any decision relating to the time or manner of effecting Chiappe's arrest or his subsequent incarceration in Argentina. Nor was any American official or agent present at the time of Chiappe's arrest or during his incarceration in Argentina. The first contact any United States official or agent had with Chiappe was aboard the Braniff airplane at Buenos Aires Airport on May 26, 1976, at about 9:30 P.M. prior to take-off on its flight to John F. Kennedy International Airport.

Accordingly, the motion is in all respects denied, *Ker* v. *Illinois*, 119 U.S. 436, 7 S. Ct. 225 (1886), *Frisbie* v. *Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952), and it is SO ORDERED.

U.S.D.J.

*Chiappe was interviewed by Mr. Fried in the early afternoon of may 27, 1976, after having been advised of his rights under *Miranda*. He advised Mr. Fried that he had no knowledge of participation of United States officials in his arrest or during his incarceration in Argentina. He stated that the first contact he had with English-speaking people was when he boarded the airplane at Buenos Aires for the flight to John F. Kennedy International Airport.

Appendix "B"

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of June one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VANGRAAFEILAND
Circuit Judges,

United States of America,
Plaintiff-Appellee

v.

Francois Chiappe, Francois Rossi, a/k/a Marcello, Paul Paganaci, Miguel Russo, Elio Paolo Gigante, Mariano Warden, Felice Bonetti, Cesar Melchiore and John Doe, a/k/a Dino,
Defendants

Francois Chiappe, Miguel
Defendant-Appellants.

77-1175
77-1182

Appeal from the United States District Court of the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

No. 77-686

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANCOIS CHIAPPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
JEROME M. FEIT,
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Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 37-38). The opinion of the district court (Pet. App. 33-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1977. The petition for a writ of certiorari was filed on November 14, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

BEST COPY AVAILABLE

QUESTIONS PRESENTED

1. Whether petitioner's indictment was obtained by the deliberate presentation of misleading testimony to the grand jury.

2. Whether petitioner's presence at trial was secured by illegal actions of the United States government.

3. Whether petitioner was denied a fair trial because the government failed to produce court records of his prosecution for bank robbery in Argentina in 1968.

4. Whether the district court abused its discretion in admitting into evidence certain items seized from petitioner and his wife after the termination of the conspiracy.

5. Whether petitioner was denied effective assistance of counsel.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to 20 years' imprisonment and fined $20,000. The court of appeals affirmed without opinion (Pet. App. 37–38).

The evidence at trial showed that petitioner, a French national residing in Buenos Aires, Argentina, was a principal participant in a major heroin smuggling conspiracy operating between France, South America, and the United States from 1965 until early 1968. Besides initially financing the operation (Tr.

99–100), petitioner provided the French heroin connection for co-conspirators Francois Rossi and Michel Nicoli, two other French nationals residing in Buenos Aires, who transported the heroin to buyers in New York (Tr. 101–110, 127–135, 142–151, 157–163, 191–199, 283–287). Later, in 1967, the conspirators recruited Miguel Russo to assist them in transporting the heroin from South America and France to the United States (Tr. 174–175, 204–205, 215–216, 219–221, 227–228, 231–232, 235–238, 278–280).[1]

ARGUMENT

1. Petitioner contends (Pet. 8–11) that the government obtained his indictment by the deliberate presentation of misleading testimony to the grand jury. Specifically, petitioner claims that the government was aware from its pre-indictment interviews with Nicoli that he had repeatedly asserted that the conspiracy involving petitioner had terminated in December 1967, yet the government deceived the grand jury by "conveniently omitt[ing]" (*id.* at 9) any reference to the termination of the conspiracy in its questioning of Nicoli in order to avoid the statute of limitations.[2] These claims are without merit.

---

[1] After pleading guilty to various narcotic offenses, Nicoli testified for the government at petitioner's trial. Following a separate jury trial, Rossi was convicted on the same indictment. His conviction was affirmed on appeal. 545 F. 2d 814 (C.A. 2), certiorari denied, 430 U.S. 907. Russo was convicted along with petitioner and received the same sentence.

[2] Petitioner's indictment was returned on February 15, 1973. Thus, petitioner had to be involved in the conspiracy on or after February 16, 1968, to be convicted (Tr. 1094).

Nicoli testified at trial that he, petitioner and Rossi arranged a heroin trip in early 1968 (Tr. 278). According to Nicoli, he went to Miami on February 14, 1968, to pick up three kilos of heroin that were to be delivered from Buenos Aires (Tr. 279–280). Upon his arrival in Miami, however, Nicoli was questioned by customs agents for about two hours. He therefore proceeded to New York without the heroin and arranged with the buyer there to have a courier obtain the narcotics (Tr. 283–284). The buyer then paid Nicoli $28,000, which he split with petitioner and Rossi on February 16, 1968 (Tr. 284–287).

In response to the government's questions at trial, Nicoli admitted that certain statements he had made to federal agents prior to petitioner's indictment (Govt. Exs. 3500–4, 3500–5) were not completely truthful because he was then attempting to conceal petitioner's involvement (Tr. 624–633). Nicoli also told the jury that the heroin transaction mentioned during his grand jury testimony (see Pet. 9) actually occurred in March 1968 and was unrelated to the trip in February 1968 involving petitioner (Tr. 634–637).

Thus, petitioner simply alludes to inconsistent statements made by Nicoli of which the jury was fully aware. There is no evidence to suggest that the government obtained petitioner's indictment knowing that it was barred by the statute of limitations. Indeed, the district court explicitly charged the jury at trial that it had to acquit petitioner unless it found that he was involved in the February 16, 1968, drug transaction (Tr. 1386–1387).

2. Petitioner contends (Pet. 11–19) that his presence at trial was secured by illegal actions of the federal government. It is settled, however, that a court's power to bring a person to trial upon criminal charges is not impaired by his forcible abduction into the jurisdiction. *Ker* v. *Illinois,* 119 U.S. 436; *Frisbie* v. *Collins,* 342 U.S. 519. Even assuming that this rule is inapplicable where a government actively secures the defendant's presence in its jurisdiction through particularly shocking and abusive conduct (see *United States* v. *Toscanino,* 500 F. 2d 267 (C.A. 2)), the record in this case demonstrates that petitioner is not entitled to relief.

At a post-trial hearing on January 7, 1977, petitioner claimed that on May 21, 1976, he was forcibly and violently seized by unknown individuals in Argentina and was beaten, blindfolded, bound in a strait jacket and confined for five or six days (Tr. II 15–20, 22).[3] Petitioner further alleged that, during his confinement, he heard English spoken and observed the presence of a person later identified as Special Agent Robert Palombo of the Drug Enforcement Administration (Tr. II 27, 34, 70–71; Tr. III 36–38). Petitioner did not contend that he was mistreated by agents of the United States after he had been delivered to their custody at the Buenos Aires airport on May 26, 1976 (Tr. II 38).

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[3] "Tr. II" refers to the transcript of the January 7, 1977, hearing. "Tr. III" refers to the transcript of the January 14, 1977, hearing. Upon their arrival in this country, petitioner and Miguel Russo had told the same district judge that they had not been abused by American agents in Argentina (May 27, 1976, Tr. 7–8).

Federal agents denied any participation, either directly or indirectly, in whatever mistreatment petitioner may have received from the Argentine authorities. Assistant United States Attorney Bernard Fried testified that, prior to petitioner's expulsion from Argentina, he had met with various officials of the Department of Justice, including an agent from the D.E.A. district office in Buenos Aires, to discuss the proper treatment of fugitives who might be expelled by the new government in Argentina (Tr. II 76–77). Fried personally conveyed the government's concern for proper treatment of such fugitives, in light of *United States* v. *Toscanino, supra,* to American officials in Argentina, including the United States Ambassador, and asked that they notify the Argentine government (Tr. II 77–81). Fried also stated that upon petitioner's arrival in the United States he questioned him about his treatment in Argentina and that, although petitioner claimed that he had been physically abused by the Argentinian police, he did not contend that he had seen any Americans during that time or that he had heard English spoken (Tr. II 87–89). In addition, Agent Palombo testified that he had never seen petitioner until petitioner had been brought aboard the airplane at Buenos Aires airport on the evening of May 26, 1976 (Tr. III 19–20).

After a full evidentiary hearing, the district court "reject[ed] the testimony of [petitioner] * * * concerning the presence of English-speaking people at the time of his arrest and during his incarceration in Argentina[,] believing it to be a fabrication crudely designed to fit the *Toscanino* standards for defeating

personal jurisdiction otherwise obtained over nonresident aliens" (Pet. App. 36) and rejected petitioner's testimony "that he was beaten repeatedly during" his period of incarceration in Argentina "as unworthy of belief" (*id.* at 35, n. *). The court instead found that (Pet. App. 36):

> the United States advised the Argentinian Government of the pending narcotic charges against Chiappe and others, and its intention of prosecuting the charges if it obtained jurisdiction over them. It urged the Argentinian Government to avoid any acts which might place United States jurisdiction over defendants in doubt. No United States official or agent participated in any decision relating to the time or manner of effecting Chiappe's arrest or his subsequent incarceration in Argentina. Nor was any American official or agent present at the time of Chiappe's arrest or during his incarceration in Argentina. The first contact any United States official or agent had with Chiappe was aboard the Braniff airplane at Buenos Aires Airport on May 26, 1976, at about 9:30 P.M. prior to take-off on its flight to John F. Kennedy International Airport.

These factual determinations, based on the district court's resolution of conflicting testimony, do not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.[4]

[4] The district court did find that petitioner, believing that he was being kidnapped by guerrillas, had resisted arrest and as a result had been assaulted by Argentine police (Pet. App. 35). But the United States government "can hardly be expected to monitor the conduct of representatives of each foreign government" where it "plays no direct or substantial role in the misconduct and the

3. Petitioner contends (Pet. 23–32) that he was denied a fair trial because the government did not produce the Argentine court records of his prosecution for bank robbery in 1968.

At trial, Alberto Borsalino, an Argentine police official, testified that on May 17, 1968, he arrested petitioner and his wife on suspicion of bank robbery and seized a false identification card and a passport from petitioner and $19,000 from petitioner's wife, which she said had been given to her by petitioner (Tr. 952–954, 957, 976–977). Officer Borsalino further stated that petitioner had not been tortured while in his custody (Tr. 978–979). At a hearing during trial to determine the admissibility of the seized evidence, petitioner asserted that he was arrested on May 15, 1968, that he was tortured by Officer Borsalino, and that he had not given his wife the money (which the

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foreign police have acted not as United States agents but merely on behalf of their own government * * *." *United States* v. *Lira*, 515 F. 2d 68, 71 (C.A. 2), certiorari denied, 423 U.S. 847. Since, as the district court found, there was no United States involvement in the misconduct of the Argentine police, "no purpose would be served by holding the [United States] Government responsible for [those] actions" (*ibid.*). See *United States* v. *Toscanino*, *supra*, on remand, 398 F. Supp. 916, 917 (E.D. N.Y.). Nor is there merit to petitioner's claim (Pet. 14–15) that American authorities were "guilty of mistreatment and denial of procedural justice" because they kept petitioner blindfolded and strait-jacketed until at least 15 minutes into the flight to the United States. Since petitioner was under arrest, he was properly restrained until the plane was airborne. In any event, such restraint and blindfolding was not "outrageous and reprehensible" conduct requiring the extraordinary remedy of divestiture of the district court's jurisdiction. *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65 (C.A. 2), certiorari denied, 421 U.S. 1001.

government claimed was the proceeds of petitioner's narcotics activities) (Tr. 812–818, 830, 834, 838–839).

Petitioner now contends that he was precluded from showing that Officer Borsalino testified falsely about the date of arrest, the fact of torture and the return of the $19,000 to petitioner's wife by the Argentine court because the government failed to produce the Argentine robbery file, as requested by the court and defense counsel. He further claims that certain of the Argentine court documents that he obtained after trial show that the prosecutor permitted Officer Borsalino "to give deliberately false testimony" (Pet. 26). These claims are not supported by the record.

To begin with, since the government did not possess the Argentine court records, their production was not required under *Brady* v. *Maryland*, 373 U.S. 83.[5]

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[5] During the hearing held to determine whether the evidence seized incident to the 1968 arrest was admissible, the district court asked the government to inquire whether any record was made "when [petitioner] complained to the judge and where a doctor talked about his injuries and what the judge said" (Tr. 836). Thus, the judge did not order production of the entire robbery case file, but rather asked the government to determine whether there was any record supporting or refuting petitioner's claim that he had been tortured and that he had complained about his treatment to an Argentine judge. Nevertheless, shortly thereafter, the court stated that it did not need the record to determine whether the evidence was admissible (Tr. 840–841). When defense counsel objected to the court's decision to rule on the motion without the Argentine documents, the court suggested that he produce them (Tr. 840–841). The court then found that the evidence was admissible because no American government agent had participated, directly or indirectly, in petitioner's arrest or search and because any acts of brutality were unrelated to the search and seizure (Tr. 844–845).

While an attorney for the government did review the file during a trip to Argentina, he simply made a cursory examination of approximately 2,000 pages of records written in Spanish, which he neither understood nor spoke, for the sole purpose of finding photographs and false identification. There is not a shred of evidence to suggest that the government attorney uncovered and then deliberately suppressed any exculpatory material. Indeed, during his examination of Judge Rene Niklison, who had been present during the prosecutor's review of the Argentine documents, petitioner made no showing that the records contained any material helpful to the defense or any evidence that contradicted Officer Borsalino's testimony.

Furthermore, the records were on file in a public building in Buenos Aires and hence were available to petitioner. His counsel was present in Argentina when the government attorney reviewed the documents, but he chose not to examine them (Tr. 771). When, during trial, the district court offered him "the rest of the week to fly down to Argentina" to examine the records, defense counsel declined the opportunity, responding "I have no need to" (Tr. 772). Petitioner's attorney also decided not to ask petitioner's counsel at his 1968 trial in Argentina to obtain the records for him.[6]

[6] During his trip to Argentina, defense counsel conferred with Dr. Baderman, the Argentine attorney who had represented petitioner at the time of the 1968 arrest (Tr. 253–254, 835–836). In denying petitioner's motion for a new trial based on the allegedly newly discovered evidence, the district court concluded that petitioner could have obtained the evidence prior to trial by the exercise of due diligence (March 4, 1977, Tr. 22).

In any event, the documents produced by petitioner in support of his motion for a new trial do not support his claim that Officer Borsalino lied at trial, much less that the government permitted the false testimony to be given. Even assuming that those records show that petitioner was arrested on May 15 instead of May 17, 1968, and that he may have been tortured while in the custody of the Argentine police, that does not prove that Officer Borsalino knowingly testified falsely about the date of arrest or that petitioner was tortured while he was in Borsalino's custody. Indeed, the district court expressly found that, although petitioner may have been physically abused by Argentinian officials, that mistreatment was unrelated to the arrest and search effected by Officer Borsalino (Tr. 844–845). Furthermore, none of the documents are or contain statements of Officer Borsalino, and therefore they could not have been used to impeach him.[7]

Finally, there is no substance to petitioner's claim that the government deliberately withheld information that the $19,000 was returned to petitioner's wife by an Argentine court as being "legitimately" her money. The 1968 robbery prosecution against petitioner and his wife had been "provisionally" dis-

[7] Petitioner misrepresents an exchange between defense counsel and the district court during Officer Borsalino's testimony at the mid-trial hearing (see Pet. 30). The judge's comments about "not [being] interested in nonsense" (Tr. 695) and his warnings to defense counsel not to waste time (Tr. 696, 698) related to questioning about the treatment accorded to petitioner's wife after the arrest and search, questioning that the judge correctly viewed as irrelevant to the admissibility of the evidence against petitioner.

missed by the Argentine court, but the case was subject to being reopened if new evidence was produced (Tr. 770). As a result, although the money was returned to petitioner's wife, there had been no official determination as to its origin. Petitioner was of course fully aware at trial that the court had returned the money (see Tr. 767–768), and the government made no effort to conceal that fact.

4. Petitioner contends (Pet. 19–23) that the district court abused its discretion in admitting into evidence certain items seized after the termination of the conspiracy that allegedly were unrelated to the narcotics offense.

As noted above, the government introduced a false passport and identification papers seized from petitioner and $19,000 seized from his wife incident to their arrest by Argentine authorities on May 17, 1968. Photographs showing petitioner together with co-conspirators Nicoli and Rossi, which had been seized during a subsequent search of petitioner's residence later that day, were also admitted. These evidentiary rulings were correct.

A district court has wide discretion in determining whether the probative value of relevant evidence is outweighed by the danger of unfair prejudice (*United States* v. *Cowsen*, 530 F. 2d 734, 738 (C.A. 7), certiorari denied, 426 U.S. 906; *United States* v. *Ravich*, 421 F. 2d 1196, 1204–1205 (C.A. 2), certiorari denied, 400 U.S. 834), and the decision to admit such evidence will not be disturbed on appeal unless it is clear that the probative value of the evidence is "substantially

outweighed" by its prejudicial effect. See, *e.g.*, Fed. R. Evid. 403; *United States* v. *Wixom*, 529 F. 2d 217, 220 (C.A. 8); *United States* v. *Fairchild*, 526 F. 2d 185, 189 (C.A. 7), certiorari denied, 425 U.S. 942.

The photographs were strong evidence that petitioner knew the other co-conspirators at the time of the conspiracy. Likewise, the false passport and the identification papers, even assuming that they were never used in the narcotics conspiracy, were similar to the implements used by the conspirators to smuggle the heroin and hence were admissible "to establish opportunity or preparation to commit the crime charged * * *." *United States* v. *Ravich*, *supra*, 421 F. 2d at 1204. See also *United States* v. *Robinson*, 560 F. 2d 507, 513 (C.A. 2) (*en banc*), certiorari denied, No. 77–5466, February 27, 1978; *United States* v. *Wiener*, 534 F. 2d 15, 18 (C.A. 2), certiorari denied, 429 U.S. 820; *United States* v. *Walters*, 477 F. 2d 386, 388–389 (C.A. 9), certiorari denied, 414 U.S. 1007; *United States* v. *Baker*, 419 F. 2d 83, 86–87 (C.A. 2), certiorari denied, 397 U.S. 976.

Finally, the money seized from petitioner's wife was properly admitted as circumstantial evidence of petitioner's participation in the conspiracy.[8] *United*

[8] Contrary to petitioner's apparent suggestion (Pet. 20), it was unnecessary for the government to show that petitioner's wife was involved in the conspiracy. Although the $19,000 in United States currency was seized from petitioner's wife, it was admitted into evidence as money possessed by him on the basis of his wife's statement that he had given the money to her (Tr. 957). The court immediately instructed the jury that petitioner "is not bound by what his wife said unless under all the circumstances you find that [she] was authorized to speak for [him] with reference to the ownership

States v. *Magnano,* 543 F. 2d 431, 437 (C.A. 2), certiorari denied, 429 U.S. 1091; *United States* v. *Tramunti,* 513 F. 2d 1087, 1105 (C.A. 2), certiorari denied, 423 U.S. 832; *United States* v. *Kenny,* 462 F. 2d 1205, 1219 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States,* 409 U.S. 914. Although the money was seized approximately three months after the termination of the conspiracy and was thought by Argentine police to be the proceeds of a bank robbery (Tr. 970–971), these factors affected only the weight, not the admissibility, of the evidence. See *United States* v. *Tramunti, supra,* 513 F. 2d at 1105. As the trial judge observed, the fact that the seizure occurred in the course of a bank robbery investigation "doesn't mean the articles seized are unrelated to the deal in narcotics" (Tr. 961).

5. Finally, petitioner's claim (Pet. 32) that he was denied effective assistance of counsel is insubstantial.[9] His counsel's failure to obtain the court files in Argentina would be significant only if petitioner was prejudiced by the oversight, but, as discussed above, petitioner has made no showing that those files support his claim that the government deliberately suppressed exculpatory evidence or that Officer Borsalino intentionally testified falsely. Indeed, the district court concluded "with absolute certainty" that the file "could not have changed the verdict" (March 4, 1977, Tr. 23).

Similarly, as to petitioner's claim that the prosecution was barred by the statute of limitations, this defense was raised by petitioner's attorney at trial and rejected by the jury. The evidence proved that a conspiracy involving petitioner continued until February 16, 1968, which was less than five years prior to return of the indictment.

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of that money" (Tr. 957). See Fed. R. Evid. 801(d)(2)(C). Moreover, as noted above, the return of the money to petitioner's wife by the Argentine court did not render it inadmissible. Petitioner erroneously characterizes that return as a determination that the money "legitimately" belonged to his wife (Pet. 21), whereas the court had simply dismissed the bank robbery case because of lack of evidence.

[9] Petitioner's present counsel was associated with his trial counsel until the latter's recent death.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
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MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978